

SERVICE DATE – JANUARY 24, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 572 (Sub-No.1)

REMOVAL, REVISION, AND REDESIGNATION OF MISCELLANEOUS REGULATIONS

Decided: January 22, 2002

Joseph C. Szabo, for and on behalf of the United Transportation Union-Illinois Legislative Board (UTU-IL), filed a petition for reconsideration of our decision in this proceeding served August 14, 2001 (August Decision).¹ In that decision, we denied a petition of UTU-IL to amend 49 CFR 1001.1(a)² to require the maintenance, preferably in the Board's library and available to the public, of the card index of Interstate Commerce Commission proceedings (card catalogue).³ We will deny UTU-IL's petition for reconsideration.

¹ UTU-IL argues that the Board did not issue its decision within 120 days as required under 49 CFR 1110. Under 49 CFR 1110.2(c), "[i]n rail cases, the Board will grant or deny a petition within 120 days of its receipt." We do not consider this matter to be a "rail case" but rather an administrative issue that does not come within the 120-day deadline.

² That section reads:

§1001.1. Records available at the Board's office.

(a) The following specific files and records in the custody of the Secretary of the Surface Transportation Board are available to the public and may be inspected at the Board's office upon reasonable request during business hours (between 8:30 a.m. and 5 p.m., Monday through Friday):

(1) Copies of tariffs and railroad transportation contract summaries filed with the Board pursuant to 49 U.S.C. 13702(b) and 10709(d), respectively.

(2) Annual and other periodic reports filed with the Board pursuant to 49 U.S.C. 11145.

(3) All docket files, which include documents of record in a proceeding.

(4) File and index of instruments or documents recorded pursuant to 49 U.S.C. 11301.

(5) STB Administrative Issuances.

³ UTU-IL had proposed that section 1001.1(a) be amended by adding a new subsection 6:

(6) Card catalogue index of proceedings maintained by the former Interstate Commerce Commission prior to 1982.

AUGUST DECISION

The card catalogue that was in the Board's library is primarily an index for locating pre-1976 ICC public dockets. In denying UTU-IL's petition to amend our regulations, we found that the card catalogue had been appropriately transferred to National Archives and Record Administration (NARA). Under the Federal Records Act (FRA),⁴ federal agencies are required to efficiently and economically maintain and/or dispose of their records. 44 U.S.C. 3102. NARA categorizes agency records to determine whether, and for how long, they are to be kept by the government. A permanent record is "any Federal record that has been determined by NARA to have sufficient value to warrant its preservation in the National Archives of the United States." 36 CFR 1220.14. Permanent records are transferred to the legal custody of NARA. 36 CFR 1228.24 and 1228.272.

In 1999, NARA approved the Board's request to transfer to NARA as permanent records significant older ICC public dockets (including ex parte, formal, finance and abandonment dockets dating from before 1976, which had been stored by the agency offsite for many years), as well as the card catalogue index to those dockets. The legal custody of the dockets was transferred to NARA's College Park, MD facilities in May 2000, but the card catalogue was not transferred until March 2001. With the transfer of legal custody of records to NARA went the responsibility to retrieve those records for their occasional use by agency employees and researchers. Therefore, in our August Decision, we found it was reasonable to transfer the card catalogue along with the dockets to which they relate in accordance with the arrangements made in 1999.⁵

UTU-IL PETITION

UTU-IL asks us to reconsider our August Decision based on what it characterizes as new evidence and material error. The alleged new evidence that UTU-IL submits is our own documentation regarding the categorization and transfer of the records at issue, which UTU-IL requested and obtained from us after our August Decision. UTU-IL notes that, according to the "Request for Records Disposition Authority" form (Form 115) approved by NARA in 1999, the

⁴ The FRA is a collection of statutes found at 44 U.S.C. 2101 et seq., 2901 et seq., 3101 et seq., and 3301 et seq. See Armstrong v. Executive Office of President, 1 F.3d 1274, 1278 (D.C. Cir. 1993).

⁵ Prior to the transfer of the catalogue, NARA called the Board's Records Officer to locate dockets when a requestor had provided no docket number. The Records Officer would go to the library, where the card catalogue was located, and search the catalogue based on mileage posts, name of carrier, etc. The Records Officer would then give this information to NARA. NARA made these requests about 2 or 3 times a week.

card catalogue would be transferred “when no longer needed by the Surface Transportation Board.” UTU-IL argues that the August Decision was arbitrary and capricious because the Board never made a finding, and did not seek comments, concerning the need for maintaining the card catalogue at the Board. UTU-IL questions whether the Board’s Records Officer had sufficient knowledge of transportation research to make this determination, and asserts that the Board’s librarian was incapacitated when the transfer of the card catalogue occurred in 2001. UTU-IL submits that, because the Board determined in 1999 that the card catalogue would be kept until no longer needed, the Board should have made findings as to whether conditions had changed to allow the transfer in 2001, or whether the original determination was inappropriate. UTU-IL also submits that there is no guarantee that NARA will always maintain the card catalogue, or that it will be nearby or open to the public. Finally, UTU-IL asserts that the catalogue has other uses besides docket control, and is an important resource for researchers.

DISCUSSION AND CONCLUSIONS

UTU-IL’s petition will be denied. UTU-IL has failed to demonstrate either new evidence or material error. The fact that UTU-IL did not request the underlying documents until after our August Decision does not make this new evidence that was not previously available to it. Nothing prevented UTU-IL from obtaining those documents prior to its original appeal in this proceeding. See Friends of Sierra R.R. v. ICC, 881 F.2d 663, 666-67 (9th Cir. 1989), cert. denied, 493 U.S. 1093 (1990) (petition to reopen based on newly presented evidence, as distinguished from new evidence, is not enough to revive the case). Moreover, while this evidence may be new to UTU-IL, we had before us our own relevant records when we reached our August Decision. Thus, UTU-IL has failed to present any evidence that could be considered new for the purposes of reconsidering our August Decision.

UTU-IL has also failed to demonstrate error in our August Decision. The Board was not required to solicit public comment on where the card catalogue should be housed. The only statutory requirement for seeking comment on record disposition concerns the destruction, not the preservation, of records. 44 U.S.C. 3303a(a). Moreover, it is the Archivist, not the agency, that is responsible for publishing such a notice and obtaining public comment.⁶ Id.

Under 44 U.S.C. 2902, the objectives of the FRA include the “simplification of the activities, systems, and processes of records creation and of records maintenance and use,” and the “judicious preservation and disposal of records.” 44 U.S.C. 2902 (4) and (5). Under the

⁶ The agency must submit to NARA records that it wishes to destroy, 44 U.S.C. 3303, and, if NARA agrees that the records have no value to warrant preservation, it will publish a notice in the Federal Register giving interested persons the right to comment, 44 U.S.C. 3303a(a). The Archivist may then “empower the agency to dispose of those records. . . .” 44 U.S.C. 3303a(a)(2).

FRA, “each Federal agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of the agency.” 44 U.S.C. 3102. In this regard, the agency “shall establish safeguards against the removal or loss of records [it] determines to be necessary and required by regulations of the Archivist.” 44 U.S.C. 3105. See Armstrong v. Bush, 924 F.2d 282, 285 (D.C. Cir. 1991).

Here, NARA approved the disposition of the card catalogue as permanent records for preservation and authorized their transfer “when no longer needed by the Surface Transportation Board.” The subsequent transfer to NARA benefitted both the Board and NARA, because the catalogue was needed by NARA to find dockets in its custody when no docket number was provided, and NARA had been seeking Board help in these matters. UTU-IL argues that the card catalogue serves other functions besides docket control, such as related matters involving a carrier, that are useful to a researcher. These functions, however, are secondary to docket management and, in any event, the information is available to any researcher at NARA’s College Park facilities.

UTU-IL expresses concern that there is no guarantee that NARA will maintain the ICC and Board dockets and the card catalogue, or keep them available to the public now that the materials are no longer in the control of the Board. These records are in NARA’s legal custody. But NARA’s functions include preserving these records, see 44 U.S.C. 2107-2109, and exhibiting them, see 44 U.S.C. 2109. Moreover, under the FRA, no records are to be “alienated or destroyed” except as provided by the FRA. 44 U.S.C. 3314. In addition, NARA must provide and maintain facilities for servicing records in its custody that are not exempt from examination, 44 U.S.C. 2110, and may not dispose of records in its custody without the written consent of the agency from which they were acquired, 44 U.S.C. 3303a(e). UTU-IL points to no statutory or regulatory provision, and we are not aware of any, that would permit NARA to unilaterally reclassify records in its custody from permanent to temporary or withdraw public access without public notice, in the absence of privacy concerns or a national emergency.⁷

Under 36 CFR 1228.22(d), agency records must be scheduled for disposition based on agency need.⁸ See also 36 CFR 1228.262(a). In our August Decision, the full Board determined

⁷ See 44 U.S.C. 2108(a) (conditions under which public access may be restricted). See also 36 CFR 1228.92 (menaces to human life or health or to property); 36 CFR 1228.94 (state of war or threatened war).

⁸ UTU-IL submits that it “has doubts concerning the propriety of the transfer from the ICC and STB to NARA.” Petition at 4 n.6. We reject this argument. The STB clearly falls within FRA’s definition of a “Federal agency.” See 44 U.S.C. 2901(14), defining “Federal agency” to include “any executive agency or any establishment in the legislative or judicial
(continued...) ”

that the transfer of the index cards to NARA was appropriate.⁹ We noted that agencies are required to maintain the minimum volume of records in office space consistent with effective and efficient operations. UTU-IL has provided no basis for reversing our August Decision. Therefore, the petition for reconsideration will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. UTU-IL's petition is denied.
2. This decision is effective on February 23, 2002.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary

⁸(...continued)

branch of the Government (except the Supreme Court, the Senate, the House of Representatives, and the Architect of the Capitol and any activities under the direction of the Architect of the Capitol)."

⁹ Thus, we need not address UTU-IL's musings about the qualifications of individual Board staff.